United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

COURT COPY 76-7113

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ANTHONY IODICE and THORNWOOD EXCAVATORS AND MOVERS, INC.,

Plaintiffs-Appellants,

-against-

PETER CALABRESE, individually and as Secretary-Treasurer of Teamsters and Chauffeurs Local No. 456, International Brotherhood of Teamsters,

Defendants-Appellees.

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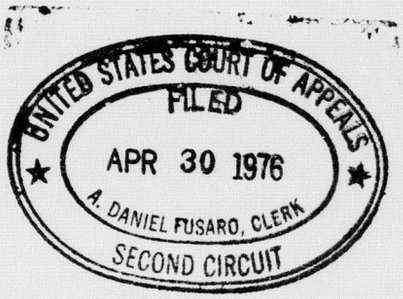
APPEAL DOCKET No. 76-7113

(67 Civ 887)



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APPELLANTS' BRIEF AND SUPPLEMENTAL APPENDIX

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ISSUE PRESENTED FOR REVIEW

Whether the compensatory damages awarded to the appellants after recomputation of same by the District Court were adequate and in accord with the mandate of this court.

PRELIMINARY STATEMENT

This action was originally commenced on February 11, 1967 in Supreme Court, Westchester County, and thereafter removed to the District Court where issue was joined by the service of an answer on March 3, 1967. It came on for trial on January 30, 1970 before the Honorable David N. Edelstein without a jury. Testimony was concluded on March 10, 1970, and oral summations given after the exchange of post-trial memoranda on April 20, 1970.

The court rendered its decision and order on June 6, 1972, on which judgment was entered on June 8, 1972, more than two years after final submission, and only after the filing of a writ of mandamus in this court, thereafter withdrawn. Both sides appealed to this court which rendered its original decision on February 25, 1975. In its opinion the Court affirmed the finding of liability against the Teamsters Union by Judge Edelstein (345 F. Supp. 248), and ordered a remand as to the damages sustained by Iodice and the Iodice/Thornwood combination (512 F. 2d.383).

On remand Judge Edelstein considered only the original record in reaching his findings of fact and conclusions of law contained in the opinion here on appeal (#44007) filed on March 5, 1976.

The appellants Iodice and Thornwood appeal from so much of the foregoing opinion and order as inadequately computes and fixes the damages awarded therein and thereby.

POINT I

THE DISTRICT COURT ERRED BY ITS FAILURE TO APPLY THE YARDSTICK TEST APPROVED BY THE CIRCUIT COURT.

It is beyond argument that the Federal Court is under an obligation to find some way in which damages can be awarded where a wrong has been done, and the court has determined that damages were in fact sustained so that the injured party shall be fairly and adequately compensated, and the wrongdoer not escape from making amends for his wrongdoing. Story Parchment Company v. Paterson Parchment Company, 282 US 555, 563 (1930); Bigelow v. RKO Pictures, 327 US 251, 265 (1946); Anderson v. Mount Clemens Pottery Company, 328 US 680, 688 (1946); and Landstrom v. Chauffeurs, Teamsters, etc., Local Union #65, 476 F.2d 1189, 1195 (2d Cir. 1973).

The damages sustained by Iodice and the Iodice/Thornwood combination consist of lost profits. The courts have recognized two general methods of proving lost profits: 1) The before and after theory; and 2) The yardstick test. Woods Exploration and Producing Co., Inc. v. Aluminum Company of America, 509 F.2d 784, 792 (5th Cir. 1975); Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974); and Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709, 713 (9th Cir. 1959).

In Lehrman v. Gulf Oil Corp. the Circuit Court recognized that the before and after theory which compares the plaintiff's profit record prior to the violation with that subsequent to it, is not easily adaptable to a plaintiff who is

driven out of business before he is able to compile an earnings record sufficient to allow estimation of lost profits. It is for this reason that the yardstick test is sometimes employed. The Court stated, at page 667 of 500 F.2d:

> "It consists of a study of the profits of business operations that are closely comparable to the plaintiff's. Although allowances can be made for differences between the firms, the business used as a standard must be as nearly identical to the plaintiffs as possible."

The Court accepted Lehrman's method of proof which encompassed elements of both the before and after theory and the yardstick theory, recognizing that it was not a classic example of either. Lehrman compared his gas station's past experience by co-relating that expense data with that of three others with which Lehrman's expert was familiar in order to establish average monthly expense data for a service station. However, no attempt was made to co-relate volume, margin or profit from the other stations; only the expense figures were used. The court stated, at page 668 of 500 F.2d:

> "Reliance upon past volume, margins and expenses in order to forecast future profits without emphasis on past profits is not the usual before and after method either. Just because Lehrman's method of proof is specially tailored to fit his case, however, does not render it unacceptable. Indeed, this court has recognized that the task of proving sales never made as a means of calculating damages is a difficult one. Thus, 'While the damages may not be determined by mere speculation or guess, it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.' The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data. Lehrman's expert's estimates of lost future profits were

based on assumptions regarding volume of gasoline sold, margin and station expense. These assumptions were unquestionably open to challenge and Gulf did challenge them before the jury. Evidentiary support for the assumptions also exists, and we perceive the resolution of the conflicting claims as the traditional responsibility of the jury." (Footnotes and citations omitted.)

The Court rejected the argument made by Gulf that even if yardstick evidence was generally appropriate in the case, Lehrman's was insufficient because the otner stations whose expenses were co-related were not nearly identical or even closely comparable to the Lehrman Gulf station. Gulf pointed out that the Brown Gulf Station specified by Lehrman's accountant, was in a growing community of 30,000 population, while the Lehrman gas station was located in a population area of only 2000. The Court noted that the Brown expenses were $5000 a year more than the Lehrman expenses, so that it was safe to assume an inflationary effect on the expense calculation - with of course a corresponding decrease in the net profits - to the advantage of Gulf. The Court also rejected Gulf's contention that the Brown figures should not be used,since those figures were experienced after Lehrman had been out of business, since Gulf had not shown how that factor in any way deflated the expense figures and thus raised the projected profits of Brown.

In sum, the Lehrman court approved a measure of damages ascertained by comparing the operation of plaintiff's gas station burdened by the yoke of Gulf's antitrust violation with the profits experienced by a larger gas station in a larger population area with a larger expense, which experience was after

Lehrman was already out of business. The remarkable similarities of the Lehrman v. Gulf Oil case with the case before this Court are self-evident. Nevertheless, the District Court, while acknowledging the similarity between the Iodice/Thornwood combination and Pleasant Excavating - identity of owner and similarity of services rendered and area of operation - stated that they are not enough to rely on Pleasant as the yardstick with which to compute damages.

The District Court found no evidence that Pleasant operated under similar market conditions as plaintiffs operated under from 1963 through 1968, since Pleasant did not begin operating until 1969, after Thornwood was defunct. (Opinion, page 7). This self-same distinction was rejected by the 5th Circuit in the Lehrman case. The District Court stated that the yardstick measure to have any value should be a comparison of operations during the same time period or at least of operations existing under similar market conditions. This too was rejected by the Circuit Court in the Lehrman case. In rejecting the yardstick test, the District Court noted that there was no testimony that demonstrated that the size of the Pleasant operation or its equipment inventory compared with the Iodice/Thornwood operation, and that the Pleasant operation costs far exceeded the Iodice/Thornwood operation costs. This very argument was also rejected by the Circuit Court in Lehrman v. Gulf Oil.

The District Court apparently, somehow and in some way, drew the inference that after six years of severe oppression

practiced on Iodice and Thornwood by the Teamsters Union during which they operated at a loss, or at a very small profit they were able to nevertheless obtain additional equipment, greatly expand the size of their operation, and thus, as Pleasant Excavators earn the profits reported in 1969. The only reasonable inference to be drawn is that Pleasant Excavating was merely the same Anthony Iodice and his sister operating the same business, with the same equipment at the same place, under a different name, but with labor peace secured by an NLRB injunction. It is thus quite reasonable to conclude that, but for the oppressive conduct of the Teamsters Union, the profits earned by Pleasant would have been earned by Iodice/Thornwood, during the years 1963 to 1968. The inference herein suggested is at least as plausible as the results achieved in Woods Exploring and Producing Company, Inc. v. Aluminum Company of America, 509 F.2d 784 (5th Cir. 1975). In the Woods case, the Circuit Court approved an award of damages based upon the profits that would have been realized by the plaintiff but for the wrongdoing of Alcoa in preventing the plaintiff from going forward with the proposed extraction plant.

Rather than adopt the yardstick test as suggested by this court in its mandate the District Court in its opinion chose to adopt a standard which is quite incomprehensible. In its wisdom the District Court chose to employ the profits realized by Iodice during the years 1963 and 1964 as a yardstick by which to measure the profits/losses realized by the Iodice/

Thornwood combination during the years 1966 to 1968. (Opinion pages 7-9) In adopting this standard, the District Court has ignored its own finding that the defendants employed coercive tactics of the most outrageous sort (345 F. Supp. 248, 264), and that plaintiffs have sufferred unfair labor practices committed against them by the Union (345 F. Supp. 248, 270), and that they may recover damages for the period subsequent to February 11, 1963 pursuant to stipulation. (345 F. Supp. 248, 270) Having thus decided that Iodice and Thornwood were the victim of the Union's wrongdoing during the entire period 1963 through 1968, and were thereby damaged during that entire period, the Court would measure the degree of damage sustained during one period with the degree of damage sustained during another period, and award the difference as compensation. Such a determination is worthy of Lewis Carroll and Alice in Wonderland. An analogous situation would be to award damages to the injured party who was the victim of a continuing assault during which he had his head bashed in two times in a row based upon the difference in pain experienced by the victim as a result of the second head bashing in comparison to the first head bashing. If we are to follow the District Court's reasoning to its logical conclusion - where the second head bashing didn't hurt as much as the first head bashing - the victim would receive no compensation, but would owe the wrongdoer the difference!

This writer shudders to think what damages would have been awarded by the District Court if the profit realized by

the Iodice/Thornwood combination between 1965 and 1968 was greater than that realized by Iodice during 1963 and 1964. Perhaps then the District Court would have found in favor of the plaintiffs on the liability, and awarded the difference in profit as damages to the defendant!

The remarks of the Honorable Irving L. Goldberg set forth in Terrell v. Household Goods Carriers Bureau, 494 F.2d 16 (5th Cir. 1974), on page 23 at footnote 12, and quoted with admiring approval by the Honorable Walter Pettus Gewin, in Lehrman v. Gulf Oil Corp., 500 F.2d 659, 669 (5th Cir. 1974) are most apt:

> "To deny recovery to a businessman who has struggled to established a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy."

This Court is also invited to compare the recent decisions as to damage assessments against other tortfeasors. Tri-Tron International v. Velto, 525 F.2d 432, 436-437 (9th Cir. 1975), a trade secret case; and Continental Management, Inc. v. The United States, 527 F.2d 613, 619 (U.S.C.C. 1975), a bribery case. In each of these very recent cases the courts went to great length to make the injured plaintiff whole. The courts applied any yardstick that seemed fair and reasonable. In the Tri-Tron case the court would not limit itself to loss sustained by the plaintiff or profits earned by the wrongdoer by the use of misappropriated trade secrets. In the Continental Management case the court found that the amount of the bribe was the

proper yardstick, refusing to cavil at the absence of specific or detailed proof of other damages. This Court should do no less.

POINT II

ON REMAND THE DISTRICT COURT FAILED TO FOLLOW THE MANDATE OF THIS COURT AND THEREBY AWARDED INADEQUATE DAMAGES.

On the original appeal to this court at POINT IV of the Appellants' Brief (pages 38 et seq.) the argument was presented to this court that the Union had egregiously wronged appellants as found by the District Court; that once the court had determined the fact of damage, the court was under an obligation to find some way in which damages could be awarded; and that the difficulty of ascertainment was not to preclude the right of recovery. It was further argued that the court was under an obligation to make a just and reasonable assessment of the damages based on probable, inferential or circumstantial evidence. Thus, once the existence of damages is proven, the amount of damages need not be proven with perfection or mathematical certainty, but only to an approximation inferable, reasonably and justly. Appellants Iodice and Thornwood argued, and this court adopted, that a proper measure of damages could be computed by comparing the years during which appellants experienced labor trouble (1963-1968) with a year of relative labor peace (1969). Iodice v. Calabrese, 512 F. 2d 383, 389 2nd Cir. 1975). This court recognized that Iodice and Thornwood had presented, and the District Court had rejected this very same manner of ascertaining the damages. (512 F.2d 388-389).

The District Court had originally refused to award damages based upon the proferred formula on the grounds that it was dissatisfied with the proof Iodice submitted concerning the profits he earned individually and with Thornwood, up to 1969, when his labor problems subsided. (345 F.Supp. 271-273) The District Court, however, did not reject the proof offered as to the profits earned by Pleasant Excavators in 1969. Judge Edelstein stated, at page 271 of 345 F.Supp. as follows:

> "Leaving aside whether this comparison is legally valid for purposes of awarding damages here, the proof of Iodice's and Thornwood's gross profits is so speculative and unsupported as tc require rejection."

It is the contention of appellants Iodice and Thornwood that on remand the District Court was obligated to reassess the proof and ascertain, if it could, the profits or lack of them realized by Iodice and Thornwood during the years 1963 through 1968 (years of labor trouble) and compare them with the profit picture of Pleasant Excavators during the year 1969 (a year of relative labor peace). (512 F.2d 389) On remand, the District Court in its opinion(#44007 March 5, 1976) did ascertain the profit picture of the Iodice/Thornwood combination during the years 1963 through 1968, but refused to compare the same with the profit picture of Pleasant Excavators for the year 1969, apparently on the grounds that they were not sufficiently similar.

The court found that during the years 1963 and 1964 Iodice earned a profit of $8250 (opinion, page 9). The court computed this profit by accepting Iodice's testimony that he

did a $30,000 gross in each year, and earned an average profit of 27-1/2%. The court computed the profit/loss experienced by the Iodice/Thornwood combination during the years 1965 through 1968 on pages 4 and 5 of its opinion. The court found a profit of $7000 in the year 1965; a loss of $6000 in the year 1966; a profit of $7500 in the year 1967; and a loss of $4500 in the year 1968. Rather than compare the profit/loss for each of the years 1963 through 1968 with the profit of Pleasant Excavators for the year 1969, the court chose to compare as its measure of damages, the profit/loss experienced by the Iodice/Thornwood combination for the years 1965 through 1968 with the profit realized by Iodice alone during 1963-1964. By so doing, the court found Thornwood entitled to a total of $18,500 worth of damage (opinion, page 9). The court continued to adhere to its earlier opinion, and awarded Iodice merely $100, as nominal damages for the wrongful acts committed against him during 1963 and 1964.

By accepting the court's findings as to profits/losses experienced by both Iodice and Thornwood, during the years 1963 through 1968, and comparing each with the profit experienced by Pleasant Excavators during the year 1969, this court can properly award-by means of a mere arithmetic computation-the proper amount of damages on the facts found by the District Court on remand. This should be done as follows: Iodice alone realized $8250 profit in 1963 and 1964. By comparing this with the net profit of $45,159.05 realized by Pleasant Excavators

in 1969 (opinion, page 6) we would find that Iodice sustained damages in 1963 and 1964 of $36,909.05 per year, for a total of $73,818.10 for the period. By comparing the profit/losses earned by the Iodice/Thornwood combination during the period 1965 through 1968, (an average of $1000 per year by the Edelstein formula in the opinion on page 5) with the profits realized by Pleasant Excavating in 1969 of $45,159.05, we would find that the Iodice/Thornwood combination sustained damages of $44,159.05 per year, or a total of $176,636,20 for the period.

If we were to combine the gross profits of Iodice and the Iodice/Thornwood combination for the years 1963 - 1968 we would find a total of $22,500 for the period, or $3750 per year. If we compare this with the net profit of Pleasant for the year 1969 of $45,159.05 we would find that the Iodice and the Iodice/Thornwood combination sustained an average damage of $41,409.05 per year for a total of $248,454.30 for the six year period 1963 - 1968.

The foregoing recitation of computation made by following Judge Edelstein's finding is set forth in the chart on the next page:

INCOME AND EXPENSE CHART AS FOUND BY JUDGE EDELSTEIN

Year	Gross Income		Costs		Profits	
	Iodice	Thornwood	Iodice	Thornwood	Iodice	Thornwood
1963	$30,000	----	$21,750 *	----	$ 8,250	----
1964	30,000	----	21,750 *	----	8,250	----
1965	22,000	$10,000	10,000	$15,000	12,000	($5,000)
1966	11,000	10,000	10,000	15,000	1,000	($5,000)
1967	22,000	10,500	10,000	15,000	12,000	($4,500)
1968	2,500	8,000	10,000	5,000	(7,500)	3,000

Summary of Income and Expense Chart
For the Period 1963 - 1968:

Gross Income:	Iodice	$117,500	
	Thornwood	38,500	
Costs :	Iodice	83,500	
	Thornwood	50,000	
Profits:	Iodice	34,000	
	Thornwood	(11,500)	(loss)

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*The cost figures for Iodice in this combined chart are gleaned from subtracting the profit of $8250 per year found by Judge Edelstein on the basis of a 27-1/2% markup. Iodice's actual testimony was that his cost of doing business in 1963 - 1964 was $15,000 in each year. (Opinion, page 4)

A careful examination of the findings made by Judge Edelstein on the remand will reveal that the profits found were gross profits rather than net profits for the Iodice/Thornwood combination during the period 1965 - 1968, since it was unclear as to whether or not overhead costs were included as to Thornwood having been excluded as to Iodice. (Opinion, page 5) Using the 27-1/2% formula for the years 1963 and 1964 as a mark-up, it is quite obvious that the $8,250 figure was a "gross" rather than a "net" profit, since no factor for overhead was included.

It is appellants' contention that the "gross" profit/loss found by Judge Edelstein for the Iodice and the Iodice/Thornwood combination during the period 1963 - 1968 should be measured against the "gross" profits found by Pleasant Excavators of $68,661.35 rather than "net" profit of $45,159.05. The figures for Pleasant Excavators for 1969 (P.Ex. 18) are as follows:

Gross business	$115,088.14
Less Non-overhead costs	46,426.79
Gross Profit	68,661.35
Less Overhead	23,502.30
Net Profit	$ 45,159.05

The figures are quite startling. For the period 1963-1964 Iodice sustained damages of $60,411.35 per year, or $120,822.70 for the period. The Iodice/Thornwood combination sustained damages of $67,661.35 per year, or $270,645.40 for

the period. Thus the total damages realized by Iodice and the Iodice/Thornwood combination for the period 1963-1968 are actually $391,468.10, rather than the $250,454,30 found by comparing the "gross" profits/losses of Iodice and e Iodice/Thornwood combination with the "net" profits of Pleasant Excavators.

A simple arithmetic computation will reveal that Pleasant had approximately a 20.3% overhead ($23,502.30 overhead out of a $115,088.14 gross). Thus it would be fair to reduce these figures to the actual net loss by factoring in the Pleasant overhead percentage. If we were to so do, we would find that the "net" damage actually sustained by Iodice was $96,295.69 for the period 1963-1964 ($120,822.70 less .203 of same or $24,527.01). We would also find that for the period 1965-1968 the Iodice/Thornwood combination sustained a "net" damage of $215,804.38. Thus the aggregate "net" damage sustained by Iodice and the Iodice/Thornwood combination for the years 1963-1968 was properly measured at $312,100.07.

POINT III

THIS COURT SHOULD COMPUTE THE DAMAGES AND DIRECT THE ENTRY OF JUDGMENT.

Pursuant to 28 U.S.C. 2106, the Circuit Court of Appeals has the right to direct the entry of appropriate judgment in all matters lawfully brought before the court. In exercising its statutory power the Court of Appeals can also modify a monetary award entered by the District Court to that maximum of damages which could have been awarded by the District Court without constituting reversible error. Petition of United States Steel Corporation, 479 F.2d 489, 500-501 (6th Cir. 1973). Also see Kosty v. Lewis, 319 F.2d 744 (C.C. DC 1963), cert. den. 375 US 964; Paull v. Archer-Daniels-Midland Co., 313 F.2d 612 (8th Cir. 1963).

There has to be an end to the litigation sometimes. There is no real reason to believe that the District Court will follow the mandate of this court upon a new remand for recomputation of damages. All of the facts have been found below. All that this court need do is make an aritmentical computation. All that a remand would do would be to serve as a further delay to these plaintiffs who have waited lo these many years for their just compensation for the egregious wrongs which they have suffered at the hands of this Union. This court should fix the damages and direct the entry of judgment.

POINT IV

INTEREST ON THE DAMAGES FOUND BY THE CIRCUIT COURT SHOULD RUN FROM THE ORIGINAL DAY OF JUDGMENT ON THE LIABILITY.

Pursuant to 28 U.S.C. 1961, interest is allowable on any money judgment in a civil case, and shall be calculated from the date of the entry of the judgment at the rate allowed by State law. Pursuant to Rule 37 of the Federal Rules of Civil Appellate Procedure, if a judgment is modified by the Circuit Court with the direction that a judgment for money be entered in the District Court, the mandate shall contain instructions with respect to the allowance of interest. The cases construing the statute and the rule have uniformly held that where the judgment on liability is affirmed, then the interest runs on the amount of damages awarded from the date of the judgment originally fixing the liability, and not from the date of the mandate of the Court of Appeals, affirming the judgment or increasing or modifying the same. Perkins v. Standard Oil Company of California, 487 F.2d 672, 676 (9th Cir. 1973); Transworld Airlines v. Hughes, 449 F.2d 51, 80 (2nd Cir. 1971),rev'd on other grounds 409 US 363; Bosarge v. Triple T Boats, Inc., 403 F.Supp. 1260, 1263 (SD Ala., SD 1975); Mascuilli v. U.S., 383 F.Supp. 50, 53 (ED Penna. 1974). Also see the interesting decision of Mr. Justice Pollack in Chris-Craft Industries, Inc., v. Piper Aircraft Corp., 384 F.Supp. 507, 526-527 (SD NY 1974).

The comments of Judge Ditter in Mascuilli v. U.S. are most apt in their application to the facts in this case. The

court said at page 53 of 383 F.Supp.:

> "The fact that this court has been unable to compute damages satisfactorily and that our decisions have been reversed and remanded twice should not work to plaintiff's detriment. She became entitled to interest as of the day the final judgment on liability was rendered, and it would be inequitable to impose the costs associated with the use of money on her rather than on the defendant whose wrongful conduct resulted in the invocation of the judicial process and who had use of the money during the pendency of the various appeals."

This action was commenced more than nine years ago (February 11, 1967); came on for trial more than six years ago (January 30, 1970); was not decided by the District Court - Honorable David N. Edelstein - until more than two years later i.e., nearly four years ago (June 6, 1972); and only after plaintiffs filed an application for a writ of mandamus in this court. Thereafter, the action was argued in this court on November 20, 1974, and decided on February 25, 1975. After remand, the District Court did not render its opinion and order until more than one year later (March 5, 1976). In view of the foregoing it is respectfully submitted that in directing the entry of judgment the court in its mandate direct that the interest run from the date of the original judgment, June 8, 1972.

CONCLUSION

It has been conclusively established that the District Court has refused to apply the yardstick test approved by this court in its remanding opinion, and that this error caused the District Court, on remand, to inadequately recompute the damages despite making the factual finding as to profits/losses experienced by Iodice and the Iodice/Thornwood combination during the years 1963 - 1968.

On remand the District Court found sufficient facts so that by an arithmetical computation this court can find that Iodice sustained damages of $73,818.10, and the Iodice/Thornwood combination $176,636.20 by comparing the "gross" profits/losses with the "net" profits realized by Pleasant Excavating Company. However, a more accurate computation by this court could be found by comparing the "gross" profits/losses realized by the plaintiffs with the "gross" profits realized by Pleasant Excavating Company diminished by the overhead factor of Pleasant. This computation would give Iodice "net" damages of $96,259.69, and the Iodice/Thornwood combination "net" damages of $215,804.38 for an aggregate "net" damages of $312,100.07 for the six year measuring period.

It has been further conclusively established that Pleasant Excavating is the proper yardstick as it was the same Anthony Iodice and his sister Alicia Giuliano doing the same type of business at the same location, with the same equipment, relatively free from labor strife due to the

blessings of an NLRB injunction.

In view of the foregoing this court should compute the damages and direct the entry of a monetary judgment to the maximum amount which could have been awarded by the District Court pursuant to the authority of 28 USC 2106, and in its mandate, direct that the interest on this judgment run from the time of the entry of the original judgment fixing the liability of the defendant pursuant to the authority of 28 U.S.C. 1961, and Rule 37 F.R.A.P.

Dated: White Plains, New York
April 28, 1976

Respectfully submitted,

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Appellants

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SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ANTHONY IODICE and THORNWOOD EXCAVATORS AND MOVERS, INC.,

Plaintiffs-Appellants,

-against-

PETER CALABRESE, individually and as Secretary Treasurer of Teamsters and Chauffeurs Local No. 456, International Brotherhood of Teamsters,

Defendants-Appellees.

----------X

NOTICE OF APPEAL

67 Civ. 887 (DNE)

NOTICE IS HEREBY GIVEN that plaintiffs, Anthony Iodice and Thornwood Excavators and Movers, Inc., plaintiffs above named hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the opinion and order of the Honorable David N. Edelstein, Chief Judge, dated and docketed on the 5th day of March 1976 as inadequately computes and fixes the damages of the plaintiffs herein.

Dated: White Plains, New York
March 17, 1976

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY IODICE, THOMAS VALENTINE, BART RUGGIERO, JUDY CAPECE, PELHAM TRANSPORTATION COMPANY, INC., and THORNWOOD EXCAVATORS AND MOVERS, INC.,

Plaintiffs,

-against-

PETER CALABRESE, individually, and as Secretary Treasurer of TEAMSTERS AND CHAUFFEURS LOCAL NO. 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants.

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67 Civ. 887 (DNE)

OPINION

#44007

EDELSTEIN, Chief Judge:

The court of appeals has remanded this case for a re-assessment of plaintiffs' damages. In this court's earlier decision 345 F. Supp. 248 (S.D.N.Y. 1972), plaintiffs' proof of "gross profits" was found to be "so speculative and unsupported as to require rejection." 345 F. Supp. at 271.

In its remanding opinion, 512 F.2d 383 (2d Cir. 1975), the court of appeals wrote:

> The district court obviously found Iodice's testimonial and documentary evidence insufficient to establish precisely how much profit was lost from 1963 until 1969. However, the court did find that during that time the union had engaged in a largely successful campaign to keep business away from Iodice. 345 F.Supp. at 254 - 55. On remand the district court should "make a just and reasonable estimate of the damage [suffered by Iodice and Thornwood] based on relevant data," Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65, 66 S.Ct. 574, 580, 90 L.Ed. 652 (1946), including the testimony of Iodice and of customers, and evidence of profits realized by Pleasant Excavators after the unfair labor practices had ceased.
>
> 512 F.2d at 389.

Plaintiffs Anthony Iodice and Thornwood Excavators and Movers, Inc. had been engaged in trucking operations in Westchester County, New York. They claimed damages under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1970). This court found that unfair labor practices had been committed against Iodice and Thornwood entitling them to seek damages under 29 U.S.C. § 187(b) to compensate for business lost due to defendants' acts.

At trial both Iodice and Thornwood sought to establish that the defendant union's unlawful conduct diminished their profits. They sought to demonstrate the extent of this damage by comparing the profits of their business operations during the period 1963 to 1969 with the profits earned in 1969 by Pleasant Excavating and Equipment Rental Co., Inc. Iodice was employed by Pleasant at the time of trial. Pleasant had operated relatively free of union activities.

To establish their respective profits during the relevant period, plaintiffs did not offer their books and records. There was testimony at trial that during the weekend after trial commenced, the office where the records were kept was burglarized and that all of the books and records were stolen. Supportive documentation, it was claimed, could not be produced. Proof of plaintiffs gross income, costs and profits were primarily based on Iodice's testimony although a collection of invoices were introduced allegedly representing some business done by Thornwood.

Iodice presented only imprecise figures based solely on his own admittedly indefinite recollection. In fact, Iodice intentionally did not look at the companies' records when preparing his testimony, although he had access to them. Rather, he testified, "I wanted to see how good I was," (Tr. 584) although he also testified that the books and records "are better than my recollection." Tr. 585. Later, in response to the court's question about Iodice's failure to review the records Iodice responded:

> I didn't think it was really important. I thought the attorney would have the books and he would produce whatever was needed. I more or less just estimated what I thought would be correct.
>
> THE COURT: Don't you think that if you were so concerned about being correct that you would have wanted to look at the books?
>
> THE WITNESS: I thought it would be more important for the attorney to take care of all that than me.
>
> Tr. 635-636

During 1963 and 1964 Iodice was in business for himself. He testified that he did $30,000 worth of business in each of those years. Tr. 523. In 1965, he began working for Thornwood, but he "was billing customers under Anthony Iodice." Tr. 524. He "transferred the company to [his] sister and people kept -- knew they were doing business with Anthony Iodice all these other years and every time we sent a bill they wanted them under Anthony Iodice because they wanted to continue doing business with Anthony Iodice, so we would bill them under Anthony Iodice, but the money was turned over to Thornwood Excavators . . . . There were some people that paid checks on Thornwood Excavators also."

Tr. 525. Money he received as an individual he put in the account of Thornwood. Tr. 644. So that for 1965, 1966, 1967 and 1968 all receipts he received by customer billings were actually Thornwood income. Tr. 646-647. During 1965 and presumedly in the subsequent years he was receiving a salary from Thornwood. Tr. 644. Nevertheless, Iodice's testimony regarding 1965 through 1968 was first in terms of billings by Iodice and then by Thornwood billings. For the relevant years, he testified that he and Thornwood had the following gross income:

Year	Iodice	Thornwood
1965	$ 22,000	$ 10,000
1966	$ 10,000 - $ 12,000	$ 10,000
1967	$ 22,000	$ 10,000 - 11,000
1968	$ 2,000 - 3,000	$ 8,000

Tr. 526-527, 529, 531-532

Iodice testified that his cost of doing business in 1963 and in 1964 was $15,000 each year. Tr. 536. As to 1965 through 1968, Iodice testified that he was familiar with the cost of doing business individually for those years but that it would be hard to state that cost because "I combined everything as one operation, not as two different operations . . . . I did business as Anthony Iodice but I used a Thornwood trailer when it was being done, so it is really hard to break it down, but

I can give it approximately, I guess. In '65, approximately $10,000 worth of costs. It's going to be hard to add in the overhead because there was the two of us together." Tr. 538 - 539.

He then testified that costs of business done as Anthony Iodice, 1965 through 1968, was $10,000 for each year. Tr. 539 - 540. In computing these costs he included "fuel, repairs, salary and miscellaneous." Tr. 539.

As to Thornwood, Iodice testified that costs were $15,000 for 1965, 1966, and 1967 respectively and $5,000 for 1968. Tr. 538, 540. It is unclear if these estimates also exclude overhead costs.

Since Iodice has testified that he worked for Thornwood during the period 1965 through 1968, it is desirable to consolidate the figures representing billings by Iodice and billings by Thornwood. The combined gross business, costs, and profit and loss figures would then break down as follows:

YEAR	GROSS	COSTS	PROFIT/LOSS
1965	$32,000	$25,000	$7,000
1966	$19,000	$25,000	($6,000)
1967	$32,500	$25,000	$7,500
1968	$10,500	$15,000	($4,500)

Plaintiffs then introduced evidence showing the business done in 1969 by Pleasant Excavating and Equipment Rental Co., Inc. which was established late in 1968 or early 1969. Tr. 900. This evidence indicated gross business of $115,088.14,

total costs of $69,929.09, and net profit of $45,159.05.' With this evidence plaintiffs urged the court to find that the business done by Iodice in 1963 and 1964 and the "combination of business done by Iodice and Thornwood during the years 1965, 1966, 1967 and 1968 should also be measured against the same business done by Pleasant Excavators." Tr. of April 20, 1970 at 62. This court never reached this consideration in its earlier opinion. 345 F. Supp. at 271.

In seeking to measure plaintiffs' lost profits by the profits of Pleasant, plaintiffs have chosen to employ what is generally known as the yardstick test. This method consists of a study of the profits of business operations which are closely comparable to the plaintff's. Although allowances can be made for differences between the firms, the business used as a standard must be as nearly identical to the plaintiff's as possible. Lehrman v. Gulf Oil Corp., 500 F.2d 659, rehearing denied, 503 F.2d 1403 (5th Cir. 1974), cert. denied, 420 U.S. 929 (1975).

Iodice testified that the owner of Thornwood and Pleasant is the same person, that there is no difference in the type of business done by Thornwood and that done by Pleasant, and that there was no difference in the work Iodice did for Thornwood and that he did for Pleasant. Tr. 930. Pleasant does business in the same area as Thornwood did business. Despite these similarities, the record is barren of further similarities. No testimony demonstrated that the size of Pleasant's operation or its equipment inventory compares with Iodice's individual operations or

with Thornwood's. Pleasant's total operation costs in 1969, $69,929.09 far exceed Iodice's costs in 1963 and in 1964 or Thornwood's costs. This in itself suggests that Pleasant's operations are larger than were plaintiffs'. Plaintiff introduced no evidence that Iodice or Thornwood were equipped to do a volume of business equal to Pleasant's. No evidence suggests that Pleasant operates under similar market conditions as plaintiffs operated under from 1963 through 1968. Pleasant did not begin operating until 1969 after Thornwood was defunct. If the yardstick measure is of any value at all, it should be a comparison of operations during the same time period or at least of operations existing under similar market conditions. Further, no testimony was offered to show how much business comparable operations did during the relevant period. The similarities that were testified to -- identity of owner and similarity of services rendered and area of operation -- are not enough to rely on Pleasant as a yardstick with which to compute damages. In short, there is no adequate basis upon which a reasonable estimate or inference will lie. Plaintiffs' attempt to prove damages by a yardstick measure must therefore fail.

In reaching this conclusion the court is aware that the court of appeals had indicated that this court include evidence of profits realized by Pleasant after the unfair labor practices had ceased within the relevant data which this court should consider when recomputing a just and reasonable estimate of plaintiffs' damages. Although this court had not reached this

consideration in its earlier review of damages, its consideration of this evidence now constrains the court from using it as data upon which to base a damages award.

However, the court has recomputed damages for lost profits on another basis. In so doing, the court is mindful that damages can not be determined by mere speculation and guess but the court may make a just and reasonable inference of approximated damages. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946).

The testimony of both Iodice and Thornwood's customers reveals that Thornwood lost business during the period of defendants' wrongful conduct. Testimony of Thornwood's customers suggests that as early as 1966 customers stopped doing business with Thornwood because of defendants' acts. Tr. 51-52; 64, 66; 68-69; 86-87; 102; 166; 184. No testimony showed customer loss to Iodice in 1963 or in 1964. Iodice's testimony indicates a decline in Thornwood's business beginning in 1966. See consolidated chart, supra. During the period 1963 through 1965 income of Iodice individually and of Thornwood is shown to be stable: Iodice earned income of $30,000 for each of 1963 and 1964, and Thornwood earned income of $32,000 for 1965. Although the court has no reasonable or nonspeculative external measure for establishing damages during the relevant period, the court is satisfied that an equitable award can be made by comparing profitability during the period of stability, 1963 through 1965, with profitability during the period of ascertainable loss, 1966 through 1968. The most just and least speculative award may be

fashioned by this method.

Iodice testified that when he priced a move he would add on a 25 - 30 per cent profit or an average profit of 27-1/2 per cent. Tr. 541 - 542. On a $30,000 gross, this would be a profit of $8,250. By comparing this base profit figure with the profits earned in 1965, 1966, 1967 and 1968, the court determined an award of $1,250 for 1965, $8,250 for 1966, $750 for 1967, and $8,250 for 1968 or a total of $18,500 damages award to Thornwood.

As to Iodice, the record reveals no relevant data which would enable the court to make a just and reasonable estimate of damages without the court engaging in speculation and guess; precedential case law constrains the court from engaging in such speculation. Accordingly, the court must resubmit its award of $100.00 nominal damages to Iodice for wrongful acts committed against him during 1963 and 1964.

So ordered.

David N. Edelstein
Chief Judge

Dated: New York, New York
March 5, 1976

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CERTIFICATE OF SERVICE

I, Leon J. Greenspan, a member of the firm of Greenspan & Aurnou, attorneys for Plaintiffs-Appellants herein, certify that I nave served the attorneys for Defendants-Appellees, with a copy of the within Brief and Supplemental Appendix by mailing a copy thereof to Sheehan & Sheehan, 51 Chambers Street, New York, New York 10007 this date.

Dated: White Plains, New York
April 30, 1976

Leon J. Greenspan

LEON J. GREENSPAN